

1 **WORKERS' COMPENSATION APPEALS BOARD**

2 **STATE OF CALIFORNIA**

3  
4 **PATRICK FARRIS,**

5 *Applicant,*

6  
7 **vs.**

8 **INDUSTRIAL WIRE PRODUCTS; and**  
9 **LIBERTY MUTUAL INSURANCE**  
10 **COMPANY,**

11 *Defendants.*

**Case No. SBR 0284141**

**OPINION AND DECISION  
AFTER RECONSIDERATION  
(EN BANC)**

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13 On June 29, 2000, the Board granted applicant's petition for reconsideration of the Supplemental  
14 Findings and Order issued by the workers' compensation administrative law judge (WCJ) on April 26,  
15 2000. In the relevant portion of that decision, the WCJ found that defendant, Liberty Mutual Insurance  
16 Company, had unreasonably failed to self-assess a ten-percent Labor Code section 4650(d)<sup>1</sup> penalty  
17 against the late payments of permanent disability indemnity made to applicant under an October 8, 1999  
18 Findings and Award. Accordingly, the WCJ imposed a penalty under section 5814 for the unreasonable  
19 failure to pay the section 4650(d) penalty. The WCJ specifically found that this section 5814 penalty  
20 "shall be calculated and paid on the total amount of the penalties calculated under section 4650(d) only."  
21 In his petition for reconsideration, applicant contends that the section 5814 penalty for defendant's  
22 unreasonable failure to self-assess the section 4650(d) penalty should not apply solely against the section  
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<sup>1</sup> All further statutory references are to the Labor Code.

1 4650(d) penalty amount, but should also apply against "the whole class of permanent disability benefits."

2 Because of the important and novel legal issue presented, and in order to secure uniformity of  
3 decision in the future, the Chairman of the Board, upon a majority vote of its members, has reassigned this  
4 case to the Board as a whole for an *en banc* decision. (Lab. Code, § 115.) Based on our review of the  
5 relevant statutory and case law, we conclude that, whenever a defendant unreasonably delays or fails to  
6 pay a section 4650(d) penalty on late payments of disability indemnity, the section 5814 penalty for that  
7 unreasonable delay or failure to pay shall be ten-percent of the entire class of the underlying indemnity, as  
8 increased by the section 4650(d) penalty.

9 **I. BACKGROUND**

10 Applicant sustained an admitted cumulative industrial injury to both upper extremities from  
11 September 1, 1989 through August 17, 1997, while employed by Industrial Wire Products, the insured of  
12 defendant.

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14 On August 24, 1999, a trial was held on various issues, including (1) the extent of permanent  
15 disability and (2) defendant's alleged unreasonable failure to pay permanent disability indemnity in  
16 accordance with applicant's treating doctor's permanent and stationary report. (It is not clear from the  
17 Board's record whether, by the time of the August 24, 1999 trial, defendant had made any permanent  
18 disability advances.)

19 On October 8, 1999, the WCJ issued a Findings and Award which determined that applicant's  
20 injury caused permanent disability of 52-percent, "entitling him to disability benefits payable at \$170.00  
21 per week over 282.25 weeks in the total sum of \$47,982.50...." (The Findings and Award did not  
22 expressly state when the permanent disability indemnity payments were to commence, but it did find a  
23 permanent and stationary date of October 6, 1998. (See Lab. Code, § 4650(b).) The WCJ further  
24 found that defendant had unreasonably delayed payment of permanent disability indemnity because it

1 failed to make permanent disability advances in accordance with applicant's treating physician's report, to  
2 which defendant had not timely objected under section 4062. Therefore, the WCJ also awarded  
3 applicant a ten-percent increase in his permanent disability indemnity award under section 5814.

4 Defendant did not seek reconsideration of the October 8, 1999 Findings and Award, so it  
5 became final.

6 On December 8, 1999, applicant filed a petition seeking further penalties under section 5814.  
7 This petition alleged, among other things, that defendant had not automatically increased the late  
8 permanent disability indemnity payments due under the October 8, 1999 Findings and Award by ten-  
9 percent, as required by section 4650(d).

10 On March 27, 2000, applicant's new penalty petition came on for trial. The disposition at trial  
11 was that the parties would have 20 days to file points and authorities; then, the matter would be submitted  
12 for a decision on the record.

13 On April 11, 2000, applicant filed his points and authorities. He contended that defendant should  
14 have self-assessed a ten-percent penalty under section 4650(d) against the accrued permanent disability  
15 indemnity due from applicant's October 6, 1998 permanent and stationary date to the date of the October  
16 8, 1999 Findings and Award. Applicant argued that this section 4650(d) penalty was "automatic" and  
17 should have been paid by defendant without any application by him.<sup>2</sup> Accordingly, applicant asserted that  
18 a section 5814 penalty should be imposed for defendant's failure to self-assess the section 4650(d)  
19 penalty.  
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22 <sup>2</sup> Although applicant's points and authorities argued that the section 4650(d) penalty should have been paid  
23 without any application by him, he did append a copy of a November 5, 1999 letter from his attorney to defendant. This  
24 letter stated, in relevant part: "It should be noted that all past and delinquent PD payments must be increased by 10%  
before computing the 10% 5814 penalty upon the permanent disability class of benefits, per section 4650(d). Ergo, all  
future PD payments to my client are to be increased by 10% as well for the 5814 order. Therefore, my client's weekly  
rate for PD payments is \$187.00 per week!"

1 On April 17, 2000, defendant filed its points and authorities. It argued that no additional penalty  
2 should be awarded because applicant had not alleged "additional separate and distinct acts [of delay]  
3 subsequent to the issuance of the [October 8, 1999] Findings and Award." It also argued that, because  
4 applicant did not seek reconsideration of the Findings and Award, he had waived his right to seek  
5 additional penalties.

6 On April 26, 2000, the WCJ issued the Findings and Award now before us. In relevant part, the  
7 WCJ first found that applicant was entitled to a ten-percent section 4650(d) penalty "on all payments of  
8 permanent disability delayed herein." The WCJ further found applicant was entitled to a new and  
9 separate section 5814 penalty for defendant's failure to self-assess the automatic ten-percent section  
10 4650(d) penalty on the accrued permanent disability indemnity payable under the October 8, 1999  
11 Findings and Award. The WCJ concluded, however, that this section 5814 penalty applied only to the  
12 section 4650(d) penalty amount, and not to all permanent disability indemnity (past, present, and future)  
13 as increased by the section 4650(d) penalty.  
14

15 In reaching his conclusion regarding the calculation of the new section 5814 penalty, the WCJ  
16 reasoned, in essence: (1) that a section 4650(d) penalty is "a clearly defined and separate category of  
17 statutory benefit which is not calculated on the entire permanent disability award;" and (2) that, because a  
18 section 5814 penalty had previously been awarded against all permanent disability indemnity, "a second  
19 such penalty on the entire category is inappropriate."

20 Thereafter, applicant filed his petition for reconsideration. Again, applicant contends that where a  
21 defendant unreasonably delays or fails to pay the "automatic" section 4650(d) penalty for a late payment  
22 of disability indemnity, the ensuing penalty under section 5814 for that unreasonable delay or failure to pay  
23 applies to the entire class of disability benefits (as increased by the ten-percent section 4650(d) penalty),  
24 and does not merely apply to the ten-percent section 4650(d) penalty amount alone.

1 We emphasize that the sole issue presented for determination is the *calculation* of the section  
2 5814 penalty where a defendant unreasonably delays or fails to pay a section 4650(d) penalty. The  
3 defendant here has not contested the WCJ's determination that the section 4650(d) penalty was  
4 unreasonably delayed and that, therefore, it is subject to a section 5814 penalty.

## 5 **II. DISCUSSION**

### 6 **A. The Calculation Of The Section 5814 Penalty**

7 We conclude that a section 4650(d) penalty is not a separate class or category of benefit,  
8 different from the underlying disability benefit to which it applies. Therefore, where it is determined that a  
9 defendant unreasonably delayed or failed to pay a section 4650(d) penalty, the ten-percent penalty under  
10 section 5814 for that delay or failure to pay is assessed against the underlying benefit to which the section  
11 4650(d) penalty attaches, as increased by the section 4650(d) penalty amount. It is not assessed only  
12 against the amount of the section 4650(d) penalty.

13 We reach this conclusion for the following reasons.

14 Section 5814 states:

15 "When payment of compensation has been unreasonably delayed or  
16 refused, either prior to or subsequent to the issuance of an award, the  
17 full amount of the order, decision or award shall be increased by 10  
18 percent...."

19 "[T]he phrase 'full amount of the...award' in section 5814 refers to the full amount of the award *for the*  
20 *particular class of benefits delayed or withheld.*" (*Gallamore v. Worker's Comp. Appeals Bd.*  
21 (1979) 23 Cal.3d 815, 826 [44 Cal.Comp.Cases 321, 328] (emphasis added); see also *Avalon Bay*  
22 *Foods v. Worker's Comp. Appeals Bd. (Moore)* (1998) 18 Cal.4th 1165, 1171 [63 Cal.Comp.Cases  
23 902, 905].) Thus, when "an award *is readily severable into the different classes or categories of*  
24 *compensation* as defined by the Workers Compensation Act (Lab. Code, § 3200 et seq.), then the

1 [section 5814] penalty is to be assessed against only the amount awarded for the particular benefit of the  
2 kind delayed or refused." (*Gallamore v. Worker's Comp. Appeals Bd.*, *supra*, 23 Cal.3d at p. 824 [44  
3 Cal.Comp.Cases at p.326] (emphasis added); see also *Avalon Bay Foods v. Worker's Comp. Appeals*  
4 *Bd. (Moore)*, *supra*, 18 Cal.4th at p.1171 [63 Cal.Comp.Cases at p. 905].)

5 In determining whether a particular payment or expense constitutes its own class or category of  
6 compensation, we are guided by the fact that a payment or expense is *not* a separate species of benefit  
7 where the payment or expense is "dependent on and ancillary to" another benefit, where the payment or  
8 expense does not have "a separate existence from" but is instead "derivative of" another benefit, or where  
9 the payment or expense is "an aspect of [a] broad class of...benefits." (*Avalon Bay Foods v. Worker's*  
10 *Comp. Appeals Bd. (Moore)*, *supra*, 18 Cal.4th at p. 1175 [63 Cal.Comp.Cases at p. 909]; see also  
11 *Jones v. Ukiah Timber Products* (1997) 62 Cal.Comp.Cases 1257 (Board en banc) [concluding that a  
12 payment or expense is not a separate species where it is "an element of the underlying benefit" (62  
13 Cal.Comp.Cases at p. 1259) or "an inseparable part of the class of ... benefits" (62 Cal.Comp.Cases at  
14 p. 1260)].)

15  
16 Turning to section 4650, it provides, in relevant part:

17 "(a) If an injury causes temporary disability, the first payment of  
18 temporary disability indemnity shall be made not later than 14 days after  
19 knowledge of the injury and disability, on which date all indemnity then  
20 due shall be paid, unless liability for the injury is earlier denied.

21 "(b) If the injury causes permanent disability, the first payment shall be  
22 made within 14 days after the date of last payment of temporary  
23 disability indemnity....

24 "(c) Payment of temporary or permanent disability indemnity subsequent  
25 to the first payment shall be made as due every two weeks on the day  
26 designated with the first payment.

"(d) If any indemnity payment is not made timely as required by this  
section, *the amount of the late payment shall be increased 10*

1        *percent* and shall be paid, without application, to the employee, unless  
2        the employer continues the employee's wages under a salary  
3        continuation plan.... No *increase* shall apply to *any payment* due prior  
4        to or within 14 days after the date the claim form was submitted to the  
5        employer under Section 5401. No *increase* shall apply when, within  
6        the 14-day period specified under subdivision (a), the employer is  
7        unable to determine whether temporary disability indemnity payments  
8        are owed....

9        "(e) If the employer is insured for its obligation to provide  
10       compensation, the employer shall be obligated to reimburse the insurer  
11       for the amount of *increase in indemnity payments, made pursuant to*  
12       *subdivision (d)*, if the late payment which gives rise to the *increase in*  
13       *indemnity payments*, is due less than seven days after the insurer  
14       receives the completed claim form from the employer...." (Lab. Code, §  
15       4650 (emphasis added).)

16       Thus, by its express terms, section 4650 makes it clear that the penalty under subdivision (d) of  
17       that section is but an "increase" *in the indemnity* that is otherwise payable under that section. The section  
18       4650(d) penalty has no "separate existence," independent of the late disability indemnity to which it  
19       attaches. Indeed, the section 4650(d) penalty only arises where an underlying indemnity payment is late.  
20       Therefore, the section 4650(d) penalty is clearly "derivative of" and "dependent on and ancillary to" the  
21       underlying disability indemnity. It is not a separate class or category of benefit.

22       Accordingly, when a section 4650(d) penalty payment has been unreasonably delayed, the ten-  
23       percent penalty under section 5814 for that unreasonable delay applies to all payments of the underlying  
24       species of disability indemnity (past, present, and future),<sup>3</sup> as increased by the section 4650(d) penalty  
25       amount.<sup>4</sup>

26       This conclusion is also consonant with related case law on the issue of penalties.

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27       <sup>3</sup> See *Rhiner v. Worker's Comp. Appeals Bd.* (1993) 4 Cal.4th 1213 [58 Cal.Comp.Cases 172].

1 It has been held that interest is not a separate benefit from the species of benefit to which the  
2 interest attaches; therefore, if a payment of interest is unreasonably delayed, the penalty applies not merely  
3 to the delayed interest, but also to the underlying benefit. (*Gellie v. Worker's Comp. Appeals Bd.* (1985)  
4 171 Cal.App.3d 917, 921-922 [50 Cal.Comp.Cases 470, 473-474]; *U.S. Fidelity & Guaranty Co. v.*  
5 *Worker's Comp. Appeals Bd. (Boicelli)* (1981) 46 Cal.Comp.Cases 270 (writ den.); see *Soto v.*  
6 *Worker's Comp. Appeals Bd.* (1996) 46 Cal.App.4th 1356, 1362 [61 Cal.Comp.Cases 578, 582].)  
7 We note that, in many ways, a section 4650(d) penalty is analogous to section 5800 interest. That is,  
8 when interest is payable against a particular species of benefit, it is generally not applicable to *all*  
9 payments of that benefit, because interest does not attach to pre-award payments or to non-delayed post-  
10 award periodic payments. (Lab. Code, § 5800.) Similarly, when a section 4650(d) penalty is payable  
11 against a particular species of indemnity, it is generally not applicable to *all* payments of that indemnity,  
12 because a section 4650(d) penalty does not apply to pre-award or post-award payments of indemnity  
13 that were timely made. (Lab. Code, § 4650(d).)  
14

15 It has also been held that where a section 5814 penalty is awarded for an unreasonable delay in  
16 the payment of a benefit, the section 5814 penalty is not a separate and distinct class of benefit from the  
17 benefit unreasonably delayed; rather, the section 5814 penalty is "part and parcel" of the underlying  
18 benefit. (*Anderson v. Worker's Comp. Appeals Bd.*, *supra*, 116 Cal.App.3d at p. 960 [46  
19 Cal.Comp.Cases at p. 346].) Therefore, if payment of the section 5814 penalty award itself is then  
20 unreasonably delayed, the new and separate section 5814 penalty for that delay must be assessed against  
21 the underlying benefit as increased by the prior penalty award, and not assessed merely against the prior  
22 penalty award. (*Anderson v. Worker's Comp. Appeals Bd.*, *supra*, 116 Cal.App.3d at p. 960 [46  
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24 <sup>4</sup> The section 5814 penalty will also apply against any prior section 5814 penalties for unreasonable delay in the  
25 same species of benefits. (See *Anderson v. Worker's Comp. Appeals Bd.* (1981) 116 Cal.App.3d 954 [46 Cal.Comp.Cases



1 Cal.Comp.Cases at pp. 346, 347].) We discern no reason why an unreasonable delay in the payment of  
2 a section 4650(d) penalty should be treated any differently.

3 Finally, the penalty provisions of section 5814 must be liberally construed in favor of the injured  
4 employee. (Lab. Code, § 3202; *State Compensation Insurance Fund v. Worker's Comp. Appeals Bd.*  
5 (*Stuart*) (1998) 18 Cal.4th 1209, 1215 [63 Cal.Comp.Cases 916, 920]; *Avalon Bay Foods v.*  
6 *Worker's Comp. Appeals Bd. (Moore)*, *supra*, 18 Cal.4th at pp. 1173-1174 [63 Cal.Comp.Cases at p.  
7 908]; *Kerley v. Workmen's Comp. Appeals Bd.* (1971) 4 Cal.3d 223, 227 [36 Cal.Comp.Cases 152,  
8 154].) One purpose of section 5814 is to "provide[] an incentive to employers and insurance carriers to  
9 pay benefits promptly by making delays costly." (*State Compensation Insurance Fund v. Worker's*  
10 *Comp. Appeals Bd. (Stuart)*, *supra*, 18 Cal.4th at p. 1214 [63 Cal.Comp.Cases at p. 919].) Where a  
11 defendant unreasonably delays or fails to pay a section 4650(d) penalty for its late payment of disability  
12 indemnity, a construction that the section 5814 penalty should apply to the underlying class of disability  
13 indemnity delayed (as increased by the section 4650(d) penalty) will more likely encourage the prompt  
14 payment of benefits than would a construction that the section 5814 penalty should apply to the section  
15 4650(d) penalty amount alone. (*Cf.*, *Gellie v. Worker's Comp. Appeals Bd.*, *supra*, 171 Cal.App.3d at  
16 pp. 920, 921 (including fn. 4); [50 Cal.Comp.Cases at pp. 473, 474 (including fn. 4)].)<sup>5</sup>

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18 Thus, for all the reasons above, we conclude that when a defendant unreasonably fails to pay a  
19 section 4650(d) penalty, the ten-percent penalty under section 5814 for that delay is assessed against the  
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22 342], discussed *infra*.)

23 <sup>5</sup> For example, if a defendant made a late payment of \$1,000.00 in accrued disability indemnity, the section  
24 4650(d) penalty on that late payment would be \$100.00. If the defendant also unreasonably failed to pay the section  
25 4650(d) penalty, and if the section 5814 penalty applied just to the \$100.00, then the section 5814 penalty would be only  
26 \$10.00. Such a small section 5814 penalty would provide little economic inducement to timely pay the section 4650(d)  
penalty.

1 underlying disability indemnity benefit to which the section 4650(d) penalty attaches, as increased by the  
2 section 4650(d) penalty amount; it is not assessed against section 4650(d) penalty amount alone.<sup>6</sup>

3 **B. The Delay Or Failure To Pay The Section 4650(d) Penalty Must Be Unreasonable.**

4 We do not mean to suggest that, whenever a defendant delays or fails to pay a section 4650(d)  
5 penalty, a section 5814 penalty will *necessarily* be awarded.

6 "The touchstone of a section 5814 penalty is a delay or refusal to pay benefits that is  
7 *unreasonable.*" (*State Compensation Insurance Fund v. Worker's Comp. Appeals Bd. (Stuart)*,  
8 *supra*, 18 Cal.4th at p. 1214 [63 Cal.Comp.Cases at p. 919] (emphasis in original).) Whether a delay or  
9 refusal to pay a benefit is "unreasonable" within the meaning of section 5814 is a question of fact to be  
10 determined by the Board. (Lab. Code, § 5814; *Gallamore v. Worker's Comp. Appeals Bd., supra*, 23  
11 Cal.3d at p. 23 [44 Cal.Comp.Cases at p. 325].)

12 Of course, as with any other delay in the payment of compensation, it is the employer's burden to  
13 establish that a delayed payment of a section 4650(d) penalty was reasonable. (See *Kerley v. Worker's*  
14 *Comp. Appeals Bd., supra*, 4 Cal.3d at pp. 227, 230 [36 Cal.Comp.Cases at pp. 154-155, 157];  
15 *Waters v. Worker's Comp. Appeals Bd.* (2000) 80 Cal.App.4th 652, 661-662 [65 Cal.Comp.Cases  
16 484, 490]; *County of Sacramento v. Worker's Comp. Appeals Bd. (Souza)* (1999) 69 Cal.App.4th  
17 726, 730 [64 Cal.Comp.Cases 30, 32].) Yet, the determination of whether a given delay is reasonable  
18 or unreasonable does not depend solely of the number of days that a payment was delayed or on the size  
19 of the delayed payment, but on the totality of the circumstances presented. (*State Compensation*  
20 *Insurance Fund v. Worker's Comp. Appeals Bd. (Stuart)*, *supra*, 18 Cal.4th at p. 1219 [63  
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23 <sup>6</sup> In view of our decision regarding the appropriate calculation of the section 5814 penalty, the fee to applicant's  
24 counsel will obviously also increase. However, because the WCJ's April 26, 2000 decision allowed a fee corresponding  
25 to 15% of the section 4650(d) and section 5814 penalty awards (without specifying an actual dollar amount for the fee),  
26 we need not expressly amend the fee provision.

1 Cal.Comp.Cases at p. 924]; *Waters v. Worker's Comp. Appeals Bd.*, *supra*, 80 Cal.App.4th at p. 662  
2 [65 Cal.Comp.Cases at p. 490]; *County of Sacramento v. Worker's Comp. Appeals Bd. (Souza)*,  
3 *supra*, 69 Cal App. 4th at p. 731 [64 Cal.Comp.Cases at p. 33].) Also, in determining reasonableness,  
4 the Board "should proceed with a view toward achieving a fair balance between the right of the employee  
5 to prompt payment of compensation benefits, and the avoidance of imposition upon the employer or  
6 carrier of harsh and unreasonable penalties." (*Gallamore v. Worker's Comp. Appeals Bd.*, *supra*, 23  
7 Cal.3d at p. 828 [44 Cal.Comp.Cases at p. 329]; *State Compensation Insurance Fund v. Worker's*  
8 *Comp. Appeals Bd. (Stuart)*, *supra*, 18 Cal.4th at pp. 1215, 1219 [63 Cal.Comp.Cases at pp. 920,  
9 923-924]; *Christian v. Worker's Comp. Appeals Bd.* (1997) 15 Cal.4th 505, 517 [62  
10 Cal.Comp.Cases 576, 585]; *Rhiner v. Worker's Comp. Appeals Bd.*, *supra*, 4 Cal.4th at p. 1230 [58  
11 Cal.Comp.Cases at p. 181].)

12 Here, however, defendant did not seek reconsideration of the WCJ's finding that its failure to pay  
13 the section 4650(d) penalty was unreasonable under section 5814. Accordingly, that issue was waived  
14 (Lab. Code, § 5904), and we will not address it.<sup>7</sup>

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17 <sup>7</sup> We observe, however, that a section 4650(d) penalty and a section 5814 penalty are not mutually exclusive.  
18 That is, "[the] section 4650 penalty does not duplicate or supersede the section 5814 penalty...[, rather,] the section  
19 4650 penalty...is intended to supplement, not to replace, the section 5814 penalty." (*Rhiner v. Worker's Comp. Appeals*  
20 *Bd.*, *supra*, 4 Cal.4th at p. 1227 [58 Cal.Comp.Cases at p. 183]; *Mote v. Worker's Comp. Appeals Bd.* (1997) 56  
21 Cal.App.4th 902, 910 [62 Cal.Comp.Cases 891, 895]; *State of California v. Worker's Comp. Appeals Bd. (Ellison)* (1996)  
22 44 Cal.App.4th 128,138-139 [61 Cal.Comp.Cases 325, 333].)

23 We also observe that section 4650(d) expressly provides that its penalty, where applicable, "shall be paid,  
24 without application, to the employee." (Lab. Code, § 4650(d) (emphasis added).) Thus, section 4650(d) is a "self-  
25 executing, strict liability provision" (*Rhiner v. Worker's Comp. Appeals Bd.*, *supra*, 4 Cal.4th at p. 1227 [58  
26 Cal.Comp.Cases at p. 83]; *Mote v. Worker's Comp. Appeals Bd.*, *supra*, 56 Cal.App.4th p. 910 [62 Cal.Comp.Cases at p.  
895]; *State of California v. Worker's Comp. Appeals Bd. (Ellison)*, *supra*, 44 Cal.App.4th at p. 139 [61 Cal.Comp.Cases  
at p. 333]) and it is "an automatic, strict liability penalty." (*State Compensation Insurance Fund v. Worker's Comp.*  
*Appeals Bd. (Stuart)*, *supra*, 18 Cal.4th at pp. 1216-1217 [63 Cal.Comp.Cases at p. 921].) As such, the Board need not  
expressly award a section 4650(d) penalty before there can be an unreasonable delay in its payment.

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### **C. Prospective Application Of This Decision**

One final point must be addressed: whether this decision is to be applied prospectively only.

In workers' compensation cases, it is not uncommon to provide that newly stated judicial rules or newly stated judicial interpretations of statutes shall be applied prospectively only. Such a declaration of prospective application is made primarily to prevent a landslide of reopenings in previously adjudicated workers' compensation cases,<sup>8</sup> which would burden the workers' compensation system and result in unfairness to those parties who had relied on a different understanding of law or had accepted a different application of the law; a declaration of prospective application may also be made to harmonize statutory provisions. (E.g., *LeBoeuf v. Worker's Comp. Appeals Bd.* (1983) 34 Cal.3d 234, 246, fn. 13 [48 Cal.Comp.Cases 587, 597, fn. 13]; *Sumner v. Worker's Comp. Appeals Bd.* (1983) 33 Cal.3d 965, 972-973 [48 Cal.Comp.Cases 369, 375]; *Atlantic Richfield Co. v. Worker's Comp. Appeals Bd. (Arvizu)*, *supra*, 31 Cal.3d at pp. 727-728 [47 Cal.Comp.Cases at pp. 509-510]; *Estrada v. Worker's Comp. Appeals Bd.* (1997) 58 Cal.App.4th 1458, 1472-1473 [62 Cal.Comp.Cases 1384, 1394-1395]; *Messina v. Worker's Comp. Appeals Bd.* (1980) 105 Cal.App.3d 964, 971-972 [45 Cal.Comp.Cases 505, 510-511]; *cf.*, *Camper v. Worker's Comp. Appeals Bd.* (1992) 3 Cal.4th 679, 688-690 [57 Cal.Comp.Cases 644, 650-652].) Although decisions regarding procedural issues are more commonly given prospective effect than are decisions regarding substantive issues (e.g., *Camper v. Worker's Comp. Appeals Bd.*, *supra*, 3 Cal.4th at p. 688 [57 Cal.Comp.Cases at pp. 651-652]),

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<sup>8</sup> The Board has continuing jurisdiction over its decisions and, within five years of an injured employee's date of injury, a Board decision can be reopened upon a showing of good cause. (Lab. Code, §§ 5803, 5804.) Ordinarily, a change in the judicial interpretation of a statute will constitute "good cause" to reopen a Board decision which had been based on prior law. (*Atlantic Richfield Co. v. Workers' Comp. Appeals Bd. (Arvizu)* (1982) 31 Cal.3d 715, 727-728 [47 Cal.Comp.Cases 500, 509]; *State Comp. Ins. Fund v. Industrial Acc. Com. (Dean)* (1946) 73 Cal.App.2d 248, 257 [11 Cal.Comp.Cases 30, 36].)

1 decisions affecting an applicant's substantive right to receive or a defendant's substantive duty to pay  
2 workers' compensation benefits will be applied prospectively under appropriate circumstances. (E.g.,  
3 *LeBoeuf v. Worker's Comp. Appeals Bd.*, *supra*, 34 Cal.3d at p. 234, fn. 13 [48 Cal.Comp.Cases at p.  
4 597, fn. 13] (decision affecting injured employee's permanent disability rating in light of the results of his or  
5 her vocational rehabilitation applied prospectively); *Atlantic Richfield Co. v. Worker's Comp. Appeals*  
6 *Bd. (Arvizu)*, *supra*, 31 Cal.3d at pp. 727-728 [47 Cal.Comp.Cases at pp. 509-510] (decision affecting  
7 employer's liability to pay State a sum equal to total dependent's death benefit applied prospectively);  
8 *Messina v. Worker's Comp. Appeals Bd.*, *supra*, 105 Cal.App.3d at pp. 971-972 [45  
9 Cal.Comp.Cases 510-511] (decision affecting surviving "widowers" entitlement to death benefits applied  
10 prospectively).)

11 We conclude that the circumstances here warrant prospective application of our decision. In  
12 particular, we are concerned that, if our decision were not applied prospectively only, there would be an  
13 undue burden on the administration of justice in the workers' compensation system as a whole. There  
14 have been innumerable payments of section 4650(d) penalties to date, as well as numerous decisions  
15 awarding such penalties. If all of these payments and/or decisions were now subject to section 5814  
16 penalty petitions, this could have an overwhelmingly adverse effect on the workers' compensation system  
17 and on the reasonable expectations of the parties participating in it. Additionally, harmonizing these  
18 statutory provisions is an important objective that is not compromised by prospective application of this  
19 newly stated rule. Accordingly, our decision in this case will apply only to: (1) section 5814 penalty  
20 petitions which allege that a defendant unreasonably delayed or failed to self-assess a section 4650(d)  
21 penalty *on late payments of disability indemnity occurring after the issuance date of this decision*;  
22 and (2) section 5814 penalty petitions which allege that a defendant unreasonably delayed or failed to  
23 self-assess a section 4650(d) penalty on late payments of disability indemnity made before the issuance of  
24

1 this decision, but which petitions were *already filed as of the issuance date of this decision* and are  
2 now pending before the Board for trial, before the Board on reconsideration, or before the appellate  
3 courts on review.

4 For the foregoing reasons,

5 **IT IS ORDERED** as the Decision After Reconsideration of the Board (En Banc) that, consistent  
6 with this opinion, the Supplemental Findings and Award of April 26, 2000, be, and it is hereby  
7 **AMENDED** to read as follows and, as so amended, is otherwise **AFFIRMED**:

8 FINDINGS OF FACT

9 ...

10 4. Defendant unreasonably failed to self-assess a section 4650(d) penalty against the late payments of  
11 permanent disability indemnity made to applicant under the October 8, 1999 Findings and Award. The  
12 ten-percent section 5814 penalty for this unreasonable failure shall be calculated against all of applicant's  
13 permanent disability indemnity (past, present, and future), as increased by the section 4650(d) penalty  
14 under Findings of Fact No. 3 herein and as increased by the prior section 5814 penalty awarded on  
15 October 8, 1999.

16 ...

17 AWARD

18 AWARD IS MADE in favor of PATRICK FARRIS and against LIBERTY MUTUAL  
19 INSURANCE COMPANY of:

20 (a) A ten-percent section 4650(d) penalty against the late payments of permanent disability  
21 indemnity made to applicant under the October 8, 1999 Findings and Award, in an actual amount to be  
22 adjusted by the parties with jurisdiction reserved before the workers' compensation administrative law  
23  
24

1 judge in the first instance, less an attorney's fee corresponding to 15% of this penalty sum, payable to  
2 Matthew Dee Rees, Esq.; and

3 (b) A ten-percent section 5814 penalty against all permanent disability indemnity (past, present,  
4 and future), as increased by the section 4650(d) penalty in paragraph (a) above, and as increased by the  
5 section 5814 penalty awarded on October 8, 1999, in an actual amount to be adjusted by the parties with  
6 jurisdiction reserved before the workers' compensation administrative law judge in the first instance, less  
7 an attorney's fee corresponding to 15% of this penalty sum, payable to Matthew Dee Rees, Esq.  
8

9  
10 ***WORKERS' COMPENSATION APPEALS BOARD (EN BANC)***

11 /s/ Merle C. Rabine

12 ***MERLE C. RABINE, Chairman***

13 /s/ Robert N. Ruggles

14 ***ROBERT N. RUGGLES, Commissioner***

15 /s/ Colleen S. Casey

16 ***COLLEEN S. CASEY, Commissioner***

17 /s/ Robert E. Burton

18 ***ROBERT E. BURTON, Commissioner***  
19  
20

21 ***DATED AND FILED IN SAN FRANCISCO, CALIFORNIA***

***7/17/2000***

22  
23 ***SERVICE BY MAIL ON SAID DATE TO ALL PARTIES SHOWN ON THE OFFICIAL ADDRESS RECORD***  
24 ***EXCEPT THE LIEN CLAIMANTS.***

25 **FARRIS, P**

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**FARRIS, P**